MOHD ZAIHAM MISLAN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: C-05-41-2000]
23 OCTOBER 2008 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Cautioned statement - Admissibility of - Administration of caution - Previous drug transaction - Prima facie case of trafficking - Defence case - Beyond reasonable doubt* D

CRIMINAL PROCEDURE: *Statements - Cautioned statements - Admissibility of - Whether caution properly administered - Previous drug transaction - Evidence Act 1950, s. 167* E

EVIDENCE: *Statement - Cautioned statement - Admissibility of - Whether caution properly administered - Previous drug transaction - Evidence Act 1950, s. 167*

This was an appeal by the accused/appellant against the decision of the High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 convicting and sentencing him to death for trafficking in cannabis. The only issue advanced by the appellant was that the trial judge had erred in accepting a cautioned statement of the appellant as being admissible evidence. The appellant ventilated two complaints: (i) that there was no proper administration of the caution; and (ii) that the cautioned statement had included a previous drug transaction that made the cautioned statement inadmissible. F G

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court: H

(1) On the facts, SP9, the recording officer, testified in open court that he had explained the caution to the appellant although SP9 had not recorded the explanation factor in the impugned statement. The truth of him explaining was never I

challenged except at the appeal stage. The appellant was a Malay person and the caution, administered in the Malay language, coincided with his mother tongue. When the appellant was asked whether he understood the caution, he answered in the affirmative. When further asked whether he still wanted to make a statement pertaining to the arrest now that he understood the caution, his answer remained in the affirmative. He also reaffirmed that the statement he was supplying was not given under threat, promise or inducement. As the recording officer had wisely administered the caution in Malay, after taking into account the appellant's ethnicity and other background facts, it would have been superfluous and a poor exercise of official discretion to unnecessarily record that act of explanation in the circumstances of the case. The sensible brevity of the cautioned statement by a few words, instead of making it suspect, gave it complete credence, what with there being no vitiating factors to reject it. SP9's unchallenged testimony in open court went a long way to further strengthen his assertion that he did explain the caution to the appellant. Furthermore, in the circumstances, even if no explanation took place, none was needed. The appellant's argument was a desperate afterthought put forth in a last ditch attempt to save himself. (para 16 & 17)

(2) As to the previous drug transaction, it was information voluntarily supplied by the appellant when the need did not arise. This merely went to show that the appellant was very cooperative and that the statement given in the course of the recording session was voluntary. Even if the impugned statement was an improper admission, independent of that alleged objectionable piece of evidence, there was ample evidence to justify the conviction, the relevant statutory provision enabling this line of thinking to be taken being s. 167 of the Evidence Act 1950. In the current appeal with all the distinguishing facts, after discarding the alleged improperly admitted evidence, the conviction could still be safely sustained. The prosecution had successfully established beyond reasonable doubt that the cautioned statement was voluntarily given and, thus, admissible as evidence. *Krishnan v. PP* (foll). (paras 21, 22 & 23)

(3) From the sum total of the evidence in this case, the trial judge could not have arrived at any other conclusion except that the prosecution had established a *prima facie* case of trafficking as per the charge. The calling of the defence was correct, and there was no reason to disagree with that finding and course of action. (para 36)

(4) The trial judge, at the end of the defence case, had opined that the appellant's defence, on the facts, was unreasonable, unbelievable and had not rebutted the prosecution's case on a balance of probabilities. The evidence, be it circumstantial or propped up by the cautioned statement, clearly showed that what happened was planned and carried out with full knowledge. Having found that the prosecution's case was successfully proven beyond reasonable doubt, the appellant was accordingly convicted and sentenced. There was no error in the trial judge's conclusion. (para 41)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh tertuduh/perayu terhadap keputusan Mahkamah Tinggi di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 yang menyabitkan dan mengenakan hukuman mati ke atasnya kerana mengedar kanabis. Isu tunggal yang dikemukakan oleh perayu ialah bahawa hakim perbicaraan telah khilaf apabila menerima sesuatu pernyataan beramaran perayu sebagai keterangan boleh terima. Perayu menghujahkan dua aduan: (i) bahawa amaran itu tidak diberi dengan betul; dan (ii) bahawa pernyataan beramaran itu mengandungi suatu transaksi dadah yang dahulu yang menjadikan pernyataan beramaran itu tidak boleh diterima.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Atas fakta-fakta, SP9, pegawai yang merekod, telah memberi keterangan di mahkamah terbuka bahawa beliau telah menjelaskan amaran itu kepada perayu walaupun SP9 tidak merekodkan faktor penjelasan itu dalam pernyataan yang disoal itu. Perayu merupakan seorang Melayu dan amaran itu, diberi dalam bahasa Melayu, adalah sama dengan bahasa ibundanya. Apabila perayu ditanya sama ada beliau memahami amaran itu, beliau jawab secara afirmatif. Apabila ditanya lebih lanjut sama

A ada beliau masih ingin membuat suatu pernyataan berhubung dengan penangkapannya setelah beliau sekarang sudah memahami amaran itu, jawapannya masih kekal afirmatif. Beliau juga mengesahkan sekali lagi bahawa pernyataan yang disediakan olehnya tidak diberi di bawah ugutan, janji atau
B dorongan. Oleh kerana pegawai yang merekod telah dengan wajar memberi amaran itu dalam Melayu, setelah mengambil dalam pertimbangan unsur-unsur etnik perayu dan fakta-fakta latar belakang yang lain, ia akan menjadi tidak perlu dan suatu pelaksanaan budi bicara rasmi yang tidak bagus untuk
C merekodkan tindakan penjelasan itu dalam keadaan kes ini. Keringkasan bijak pernyataan beramaran itu dengan beberapa perkataan sahaja, daripada membuatkannya dicurigai, membuktikan kebenarannya, lebih-lebih lagi dengan ketiadaan faktor-faktor yang tak sah untuk menolaknya. Testimoni SP9
D dalam mahkamah terbuka yang tidak dicabar lagi memperkuatkan kenyataannya bahawa beliau telah menjelaskan amaran itu kepada perayu. Tambahan lagi, dalam keadaan, walaupun penjelasan tidak dibuat, ia memang tidak diperlukan. Penghujahan perayu adalah sesuatu yang difikirkan kemudian
E terdesak yang dikemukakan sebagai percubaan terakhir untuk menyelamatkan dirinya.

(2) Berkenaan dengan transaksi dadah yang dahulu, ia adalah informasi yang diberi secara rela oleh perayu apabila tidak
F perlu. Ini hanya menunjukkan bahawa perayu sungguh bekerjasama dan bahawa pernyataan yang diberi dalam penjalanan sesi merekodkan itu adalah secara rela. Meskipun pernyataan yang disoal itu merupakan suatu yang tidak patut diterima masuk, selain dari keterangan yang dibantah itu,
G terdapat banyak keterangan yang menjustifikasikan sabitan itu, peruntukan statutori relevan yang membolehkan pemikiran sebegini digunakan ialah s. 167 Akta Keterangan 1950. Dalam rayuan kini dengan semua fakta-fakta yang dibezakan, selepas mengenepikan keterangan yang dikatakan tidak patut diterima,
H sabitan itu masih boleh dibenarkan dengan selamat. Pendakwaan telah membuktikan melampaui keraguan munasabah bahawa pernyataan beramaran itu telah diberi dengan rela dan, oleh itu, boleh diterima sebagai keterangan. *Krishnan v. PP* (diikuti).

I

(3) Dari jumlah keseluruhan keterangan dalam kes ini, hakim perbicaraan tidak dapat mencapai apa-apa kesimpulan selain daripada bahawa pendakwaan telah membuktikan suatu kes *prima facie* mengedar seperti dalam tuduhan. Pemanggilan pembelaan adalah betul, dan tiada apa-apa sebab untuk tidak menyetujui dengan dapatan itu dan penjalanan tindakan itu.

(4) Hakim perbicaraan, pada penghujung kes pembelaan, telah berpendapat bahawa pembelaan perayu, atas fakta-fakta, tidak munasabah, tidak boleh dipercayai dan tidak dapat mematahkan kes pendakawan atas imbangan kebarangkalian. Keterangan, sama ada ia ikut keadaan atau disokong oleh pernyataan beramaran itu, jelas menunjukkan bahawa apa yang terjadi dirancang dan dilaksanakan dengan pengetahuan penuh. Setelah mendapati bahawa kes pendakwaan telah dibuktikan melampaui keraguan munasabah, perayu telah disabit dan dihukum sewajarnya. Tidak ada apa-apa kekhilafan pada kesimpulan hakim perbicaraan.

Case(s) referred to:
Boudreau v. The King [1949] 94 CCC 1 ***(refd)***
Din Yahya v. PP [1992] 1 CLJ 17; [1992] 1 CLJ (Rep) 100 SC ***(refd)***
Krishnan v. Public Prosecutor [1987] 1 MLJ 292 ***(foll)***
Lister v. Quaif [1983] 1 WLR 48 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Aidil Ma'rof [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohamed Noor Jantan [1979] 2 MLJ 289 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Tan Too Kia v. PP [1980] 2 MLJ 187 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 37A(1)(b), 39B(1)(a)
Evidence Act 1950, s. 167

For the appellant - Bachan; M/s Bachan & Kartar
For the respondent - Aslinda Joned (Sharifah Norhafishah with her) DPPs

[Appeal from High Court, Kuantan; Criminal Trial No: 45-6-1999]

Reported by Suresh Nathan

A

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This is a drugs trafficking case with the accused (hereinafter referred to as the appellant) having been charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 at the High Court. The amended charge reads as follows:

> Bahawa kamu pada 22hb April, 1999 jam lebih kurang pukul 8.10 malam di dalam sebuah kenderaan no: JCY 3936 bertempat di Kilometer 14, Jalan Pekan Nenasi, Pekan, didalam Daerah Pekan, dalam negeri Pahang Darul Makmur telah didapati mengedar dadah berbahaya iaitu Cannabis (ganja) seberat 45,565 gram, dan oleh yang demikian kamu telah melakukan suatu kesalahan dibawah seksyen 39b(1)(a) Akta Dadah Berbahaya 1952 (Akta 234), dan boleh dihukum dibawah seksyen 39b(2) Akta yang sama.

[2] The High Court judge found him guilty and accordingly convicted him. As the law provides only one sentence he was thereupon sentenced to death by hanging. Being dissatisfied the appellant filed a notice of appeal against that conviction and sentence. The appeal was then heard by this panel, and being satisfied with the learned judge's finding, we accordingly dismissed the appeal whereupon we confirmed the conviction and sentence.

[3] At the outset counsel for the appellant had ventilated that he was taking up only one issue from the memorandum of appeal ie, the learned judge had erred when he had accepted the cautioned statement of the appellant as being admissible evidence. The rest of the grounds were abandoned and never touched upon in the course of the proceedings. As regards the cautioned statement the appellant had ventilated two complaints *viz.* that:

1. there was no proper administration of the caution; and
2. the cautioned statement had included a previous drugs transaction and hence had made the cautioned statement inadmissible.

[4] Despite this approach of merely focusing on the cautioned statement by the appellant, we were not unmindful, after perusing the grounds of judgment that the learned judge's decision rested in a large way on the contents of the statement. On that premise, despite the supposed abandonment of the rest of the grounds, this

panel had reappraised the facts and law, and on the totality of the evidence decided independently whether the decision meted down by the learned judge was correct or not.

[5] We now discuss the issues pertaining to the cautioned statement. For easy reference of our prognosis I reproduce the impugned caution which is found at s. 37A(1)(b) of the Dangerous Drugs Act 1952 (Act 234) (hereinafter referred to as the Act). Since the appellant had been arrested, the caution provided for and to be administered are the following words or words to the like effect (*Din Yahya v. Public Prosecutor* [1992] 1 CLJ 17; [1992] 1 CLJ (Rep) 100):

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

[6] A precondition to the admissibility of the statement is that 'a caution was administered'. Regretfully, no definition is supplied in the Act for the word 'administered', or whether mere reading of the caution will suffice; or for that matter the required number of times the caution ought to be administered. Simply put the above provision is silent as to whether the caution must be explained to ensure comprehension of it. Regardless of the want of guidelines, the statement to be admissible must be voluntarily given, and to arrive at that finding the learned judge must assess all the facts and circumstances that surround the giving of the statement. And of course the caution would be the starting point. Voluntariness is central in the admissibility of a confession or a cautioned statement as in this case. Conventional wisdom demands that when an accused person has a poor command of the language adverted to, or say, an accused person is deaf, an explanation must be provided for to ensure adequacy of protection for them. Any diminution of that protection would inevitably dilute the admissibility of the cautioned statement. In *Boudreau v. The King* [1949] 94 CCC 1 (SCC) while in custody during the investigation of a murder case, the appellant had made two written statements to the police during the course of questions put to him. He was later charged, tried and found guilty and condemned to be hanged. This conviction was upheld by the Court of King's Bench, Province of Quebec hence the appeal to

A the Supreme Court of Canada. In the latter court one of the issues to be resolved was whether the confession of the appellant was voluntary or not. Kerwin J in the course of it had opined:

> All the surrounding circumstances must be investigated and, if upon review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases an important one.

B

[7] What is equally important to the current appeal was the C remark made earlier by Kerwin J that 'the mere fact a warning was given was not necessarily decisive in favour of admissibility'. In a word a need may arise in certain circumstances that some explanation may be required. But we need to hastily add that, merely for the sake of supplying a safety net, a blanket D requirement of the caution be mindlessly explained to every arrested accused person all the time, despite the want of need, will be of no benefit to anyone either. Whether a requirement arises to explain or not will very much depend on the facts and circumstances of each case (*PP v. Aidil Ma'rof* [1992] 2 CLJ E 1239; [1992] 3 CLJ (Rep) 317).

[8] For purposes of this case, the police after arresting him had administered the caution in the following manner:

> Adalah menjadi kewajipan saya memberi amaran bahawa kamu F tidak diwajib untuk berkata apa-apa atau menjawab pertanyaan saya tetapi apa-apa jua yang kamu katakan samada bagi menjawab pertanyaan saya atau tidak boleh diberikan sebagai keterangan.

[9] There was absolutely nothing wrong in administering the G caution in the Malay language as the appellant was a Malay person, and to do anything differently would have attracted additional problems, in the like of having to supply an interpreter. Common sense demands that the language alluded to must be that of his mother tongue, a sensible course of action which thankfully H had been undertaken here. In *Tan Too Kia v. PP* [1980] 2 MLJ 187 the Federal Court had occasion to remark:

> ... we would observe that generally speaking it is desirable that a suspect be interrogated in a language in which he is at home ...

I

[10] With the language coinciding with his ethnic grouping, the factor of language thus was a non-issue in the appeal. The above Malay caution format too has been accepted in previous cases, and when interpreted into English, reads no differently to the English version, also supplied above. From the concession made by counsel for the appellant earlier it was obvious that he was not objecting to the words or contents of the caution.

[11] We now touch on the specific dissatisfaction of the appellant. Counsel had ventilated that the caution was not explained, together with the consequences to the appellant, despite SP9 (or SP1 in the trial within the trial) having stated:

> Saya bacakan amaran itu kepada tertuduh dan jelaskan maksudnya. Kemudian saya tanya dia sama ada dia faham amaran yang saya bacakan. Dia jawab dia faham (I administered the caution and explained the meaning. Then I asked him whether he understood the caution that I just administered) Sebagai tanda dia faham itu saya telah tandatangan sebagai pegawai yang memberi amaran itu dan diikuti tandatangan tertuduh sendiri di situ.

[12] The appellant had ventilated that this testimony of having explained the caution was an afterthought as nothing about it was recorded in the cautioned statement. The appellant further extended his argument that, even if the caution had been read out, and even if the Act did not define 'administered', mere mechanical reading of the caution could not be construed as 'administering' the caution. For comparison purposes, the relevant portion of the cautioned statement, which confirms the non-explanation of the caution, reads as follows (with the translation in English supplied by me):

> Soalan: Kenapa kamu ditangkap?
>
> Jawab: Saya ditangkap kerana ganja.
>
> Soalan: Adakah kamu hendak ceritakan berhubung dengan penangkapan kamu ini?
>
> Jawab: Ya.
>
> Sebelum saya merakamkan percakapan penama Mohamed Zaiham bin Mislah KN: A3098473 saya telah memberi amaran mengikut Sek. 37A(1)(b) Akta Dadah Berbahaya 1952 spt berikut:

A ... (caution is as above i.e. the Malay version)

TT OKT — Pegawai yang mencatit

(unintelligible signature) — (unintelligible signature)
Mohd Sauki bin Arifin
B ASP

Soalan: Adakah kamu faham amaran yang saya bacakan ini (Question: do you understand the caution I am administering now)?

C Jawab: Ya, saya faham (Answer: Yes, I understand).

Soalan: Setelah kamu memahami amaran itu adakah kamu masih hendak beri percakapan berhubung dengan tangkapan kamu ini (Question: Now that you understand the caution do you still wish to make a statement pertaining to your
D arrest)?

Jawab: Ya (Answer: Yes).

Soalan: Adakah percakapan kamu ini diberikan secara sukarela?

E Jawab: Ya.

Soalan: Adakah kamu diugut, dijanji atau didorong menceritakan apa-apa kepada saya?

Jawab: Tidak ada.

F **[13]** The appellant had submitted, as reflected from the above excerpt, that the cautioned statement was silent as regards the alleged explanation. This afterthought argument as canvassed by the appellant was a straw clutching attempt, as the prosecution had adduced unchallenged oral evidence that the caution was
G indeed explained to him, though not meticulously recorded in the cautioned statement. With this extra step undertaken in open court what else could the court do but accept that testimony, more so with no cogent rebuttal evidence diluting it. There was
H no reason for the court to question the truth of the prosecution witness's assertion.

[14] For purposes of this appeal, it is undeniable that s. 37A(1)(b) of the Act is an admissibility provision, and an exception to the hearsay rule, whereby a statement recorded from
I the accused person may be made admissible, but conditional on the prosecution being capable of satisfying all the condition

precedents. Inevitably the recording officer is called as a witness by the prosecution to establish all the onerous requirements (*PP v. Mohamed Noor Jantan* [1979] 2 MLJ 289; *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285). This is also in accord with the best evidence rule which requires that in a case of a written statement the recording officer must be called to prove it (trial within a trial by S. Augustine Paul).

[15] In the course of recording a cautioned statement it is not unusual for certain repetitive words, pauses or grunts being deliberately left unrecorded, either for economy of time, space or brevity sake. These irrelevancies surely do not deserve a place in such an important piece of document. In other words, when recording a cautioned statement some basic discretion must be accorded to the recording officer, to enable him to perform his duty reasonably well.

[16] Let us scrutinise the facts and circumstances surrounding the cautioned statement recording session. It is undeniable that SP9 was the recording officer. In open court he had testified that he had explained the caution to him, though as this panel found, he had not recorded the explanation factor in the impugned statement. The truth of him explaining was never challenged except at the appeal stage. At the risk of repeating the appellant is a Malay person and the caution coincided with his mother tongue. When asked whether he understood the caution he answered in the affirmative. He was further given another chance when he was asked whether he still wanted to make a statement pertaining to the arrest now that he understood the caution. His answer remained in the affirmative. He also reaffirmed that the statement he was supplying was not given under threat, promise or inducement. As the recording officer had wisely administered the caution in Malay, after taking into account his ethnicity, and the other background facts it would have been superfluous and a poor exercise of official discretion, to unnecessarily record that act of explanation, in the circumstances of the case. The sensible brevity of the cautioned statement by a few words instead of making it suspect, gave it complete credence, what with there being no vitiating factors to reject it. His unchallenged testimony in open court went a long way to further strengthen his assertion that he did explain the caution to the appellant.

[17] To wind up this issue, it was our view too that in the circumstances of the case, even if no explanation took place, none was needed. On reflection, after a thorough prognosis of the evidence in the preceding paragraphs, the picture that eventually emerged was that it was a desperate afterthought argument put forth by the appellant in his last ditch attempt to save himself.

[18] The second argument regarding the cautioned statement was that it had included a previous drugs transaction and hence had besmirched the cautioned statement's admissibility. At the very least, this transaction should have been deleted, blocked out or expunged from the cautioned statement as it was construable as bad character evidence, which had occasioned a miscarriage of justice. The controversial statement, which is found at the last portion of the cautioned statement, reads as follows:

> Soalan: Adakah ini kali pertama kamu pergi ke Tak Bai untuk ambil ganja?
>
> Jawab: Kali pertama Sam bawa saya untuk kenalkan dengan Maggi dan kali kedua saya pergi sendiri dan bawa balik 45 ketul ganja.
>
> Percakapan dibaca balik dan diakui betul.
>
> Soalan: Adakah kamu ingin tambah atau ubah percakapan kamu?
>
> Jawab: Tidak
>
> T.T OKT Dihadapan saya
>
> (signed) (signed)
> (Mohd Sauki Ariffin)
> ASP

[19] As regards this transaction when posed with the question whether the learned judge was prejudiced, the appellant's counsel answer was, "not in so many words". When posed with the question whether the judge had stated that it affected his mind, the answer again was, "not in so many words". The learned judge when touching on this transaction had stated:

> Tertuduh juga mengakui pergi ke Tak Bai kali pertama bersama Sam dan diperkenalkan dengan Maggie dan kali keduanya dia pergi sendiri dan membawa balik 45 kilo ganja. Tertuduh tahu keluasan ruang yang dia perlu dalam boot JCY 3936 untuk menyimpan 48 kilo ganja yang akan dibelinya dan dibawa pulang dan atas dasar itulah dalam P27 dia mengaku dia "buka tayar simpanan untuk saya simpan ganja di dalamnya".

[20] Perusing this excerpt, the relevancy of the reproduction of the statement of the first transaction near verbatim by the learned judge in the grounds of judgement, was only associated to the space required in the car in order to hide the 48 kilos of cannabis, which entailed the taking out of the spare tyre so as to provide space for the drugs. Never did the learned judge state that this statement had prejudiced or clouded his thinking, or for that matter making much of it, which aided in the eventual conviction of the appellant.

[21] This extra piece of information supplied by the appellant to the recording officer could not have been conjured by him as he was not an interested person. Simply put it was information which was voluntarily supplied by the appellant when the need did not arise. This merely goes to show that the appellant was very co-operative and the statement given in the course of the session was voluntary. Even if the impugned statement was an improper admission, independent of that alleged objectionable piece of evidence, we are still of the view that there was ample evidence to justify the conviction. The relevant statutory provision that enables us to take this line of thinking is s. 167 of the Evidence Act 1950. It reads:

> **167 No new trial for improper admission or rejection of evidence**
>
> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[22] If without this alleged damning piece of evidence the defence would not have been called, then we would not have hesitated in allowing the appeal. The approach undertaken by us is not without precedent. In *Krishnan v. Public Prosecutor* [1987] 1 MLJ 292 the appellant faced two charges, one for trafficking and the other for cultivating cannabis. The latter charge was then stayed. Unfortunately, the statement taken from the appellant, which included evidence of cultivation of ganja hence inadmissible, irrelevant and prejudicial to the charge of trafficking, was

considered in the trafficking charge. In a gist this incriminating portion was allowed to remain exposed in the cautioned statement, and wittingly or unwittingly, was considered in the proceedings of the first charge. Wan Sulaiman SCJ, after rejecting the improperly admitted evidence, did not set aside the conviction immediately, but instead had taken the extra step of enquiring:

> After discarding the evidence improperly admitted, is there sufficient left to justify the conviction? ... the likely result, in our mind, would have been that the defence would never have been called.

[23] The Supreme Court forthwith acquitted and discharged the appellant. Following the approach of the Supreme Court, and permitted by s. 167 of the Evidence Act 1950 we were satisfied that in the current appeal with all the distinguishing facts, after discarding the alleged improperly admitted evidence, the conviction could still be safely sustained. To close up this chapter on the cautioned statement, this panel was satisfied that the prosecution had successfully established beyond reasonable doubt that the cautioned statement was voluntarily given, and thus admissible as evidence.

[24] We now peruse the facts, and decide whether together with the cautioned statement there was sufficient evidence to call the defence, and eventually sustain the conviction of trafficking. In relation to the factual matrix, on 22 April 1999, SP8 ie, L/Kpl Abdul Rahim while on patrol duty in a patrol car with L/Kpl Zainuddin ie, SP10, a vehicle (Proton Wira make) with registration number plate JCY 3936, overtook them at a double line area. Observing the obvious breach of the Highway rules they gave chase and the offending vehicle was eventually overtaken and stopped. SP8 thereupon directed the driver to produce a driving license and at the same time also informed him of the traffic offence just committed. The driver was the appellant.

[25] In the course of that exchange SP8 detected the aroma of cannabis from the appellant's car. He was asked whether he had cannabis with him. The appellant pleaded with SP8 before handing his driving license. This police officer testified that the appellant looked anxious and worried. SP8 then directed him to open his car boot and the compartment of the spare tyre as well. Upon opening the boot, SP8 saw plastic wrapped slabs of which

he suspected to be cannabis inside the spare tyre compartment, with the spare tyre missing. In the boot were also found the Johore edition of the Harian Metro newspaper dated 20 April 1999 and the Utusan Malaysia newspaper dated 21 April 1999. The accused was promptly arrested and brought to the police station.

[26] As regards the car the prosecution had adduced evidence that the appellant was in Johore Bahru on 20 April 1999 and had hired the car there. The Harian Metro dated 20 April 1999 merely confirmed his presence in Johore Bahru on that date. The Utusan Malaysia newspaper confirmed his statement that he was in Kelantan on 21 April 1999.

[27] The missing spare tyre was found with one Mohamad Rashid (SP5) the guarantor of the hired car and also a friend of the appellant. The accused had informed him that he intended to drive up north hence the need to hire the car. When SP5 left for work, the appellant had stayed behind in his house, and it was during that span of time that the spare tyre must have been removed from the vehicle and left behind. He realised the existence of the spare tyre after returning from work. This piece of evidence was corroborated by his housemate (SP7). In normal circumstances, to remove a spare tyre when one is about to travel long distance would be an imbecilic thing to do, unless its removal was deliberate and intentional. The space of the spare tyre compartment as said earlier was later found filled with slabs of cannabis. No one else could have removed the spare tyre, unless by the appellant, as he had absolute control and custody of the vehicle.

[28] In the course of the hearing SP1, a chemist, confirmed that the offending slabs were cannabis weighing 45,565 grams. His four tests, apart from the physical and microscopic tests included the Dequinine Levine Test (DLT) and the TLC tests (RR 4-13). He testified as per RR 6:

> Sebagai kesimpulan berdasarkan 4 pemeriksaan dan ujian yang dijalankan dan mengambilkira keputusan-keputusan tersebut secara total saya mengesahkan bahawa bahan tumbuhan dalam 48 blok tersebut adalah cannabis seperti yang ditakrif dalam sek. 2 Akta Dadah Berbahaya 1952.

[29] The learned judge in a well written judgement had accepted the chemist's evidence and had concluded that the plant material were in fact cannabis. We found no fault in this finding. At p. 10 of the grounds of judgment the learned judge had said:

> Dalam kes ini, SP1 bukan sekadar menganalisis kandungan 10% daripada 48 ketulan yang diterima tetapi kesemua bahan tumbuhan yang terkandung di dalam 48 ketulan itu. Dan dia mendapati 100% bahan tumbuhan itu adalah cannabis seperti ditakrif dalam seksyen 2 ADB dengan jumlah beratnya seperti dinyatakan dalam pertuduhan. Ujian DLT dan TLC adalah ujian penentuan identiti, sama ada 5%, 10% atau 50% bahan yang diuji tidak akan mengubah identitinya. Lagi pun tidak terdapat kelemahan dalam keterangan SP1 mengenai analisis yang dijalankan untuk dipertikai rumusan yang dibuat. Butiran bagi setiap ujian yang dijalankan telah di catitkan dan dikemukakan sebagai P7. Walaupun penemuan fakta adalah tanggungjawab Mahkamah, dalam menangani dan menimbang keterangan SP1 Mahkamah ini akur dengan pendekatan yang disarankan oleh Mahkamah Agong dalam kes *Munusamy v. PP* [1987] 1 MLJ 492 supaya keterangan ahli kimia diterima melainkan ia ternyata sukar dipercayai. Lihat juga keputusan Mahkamah Agong dalam kes *PP v. Lam San* [1991] 3 MLJ 426. Oleh itu tiada sebab bagi Mahkamah ini menolak keterangan SP1.

[30] In support of its case the prosecution had tendered the appellant's disputed cautioned statement (P27), and despite objections by the appellant, the learned judge had admitted it. He found that the cautioned statement was free of any threat, promise or inducement and thereupon declared it admissible. He opined that it was given voluntarily. As we had clarified in the preceding paragraphs we too found that the cautioned statement (P27) was given voluntarily and thus admissible as evidence.

[31] The learned judge had accepted the prosecution's stance that the appellant had knowledge, custody and thus possession of the cannabis. Much reliance was made on the admitted cautioned statement. Let us peruse the pertinent portion of the cautioned statement which was also analysed by the learned judge, together with the conclusion, which we found hard to disagree.

[32] The relevant portion of the caution statement briefly reads that one person by the name of Sam had given him RM10,000 to pay for the rental of a car and payment of the cannabis from a person called 'Maggie' (These two names were never taken into

account by the court as they were never established by the appellant). On 20 April 1999 in Johor Bahru he had rented JCY 3936 for three days and had taken out the spare tyre to fill it up with the cannabis to be purchased. That night he left for Kelantan and the next day went to Tak Bai, Thailand. There he met Maggie and subsequently bought the 48 slabs of cannabis from her. He had arranged and concealed the slabs of cannabis in the compartment of the spare tyre in the boot himself. On the way back he was detained by a police patrol car. The way we see it, from whom or where he acquired the drugs were not important, but the fact that he went to buy the cannabis and the discovery of the cannabis in his car were.

[33] As clarified above it was crystal clear that the drugs as per the charge had been established as cannabis. I need not repeat the evidence pertaining to this as it has sufficiently been discussed above. Was the appellant in possession of the drugs? As there is no possession without knowledge the prosecution had to establish this ingredient. Prior to being detained the appellant, being alone and the driver of the car, was the absolute master of everything in it. With the successful tendering of the cautioned statement the prosecution had established beyond reasonable doubt that the appellant had knowledge of the drugs in the car. From that piece of document he had evinced that he had personally arranged the concealment of the drugs in the spare tyre compartment of the car. With no caveat on the drugs, and with him being physically in control of the vehicle and the drugs, needless to say he had the power of disposal over them (*Pendakwa Raya v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). In fact, from the chain of abundant evidence adduced by the prosecution (even without the assistance of the cautioned statement), in particular the preparation prior to the buying of the drugs in the like of having a mode of transport, readying space for the offending drugs, his anxious behaviour when detained, the strong aroma that permeated the air and promptly detected by SP8 and the other police personnel, all pointed to this ingredient having been sufficiently proved. With the appellant positively having custody or control not only of the vehicle, but also knowledge of the drugs in the car, the learned judge was perfectly right in finding the prosecution having proved the ingredient of possession independently of s. 37(d) of the Act.

A **[34]** As regards the ingredient of trafficking it was obvious that the learned judge had found no difficulty in arriving at a positive conclusion too. For our appreciation I reproduce the relevant provision of trafficking where it is defined as follows (s. 2 of the Act):

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> "trafficking" includes the doing of any of the following acts, that is to say manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

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[35] The learned judge in no uncertain terms had found that the appellant was trafficking ie, by direct evidence, as he had intentionally transported and or concealed the cannabis in JCY 3936 (See p. 27 of the learned judge's grounds of judgment).
D This approach was not without precedent as Hashim Yeop Sani CJM in *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 had remarked:

> The definition of 'trafficking' in the Act (ADB) is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more then passive possession or self-administration of the drug.

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[36] From the sum total of the testimony of witnesses who knew him, testimony of police officers who arrested him, the evidence of the chemist, connective evidence in the like of the newspapers, the cautioned statement, evidence of smell, conduct and other
G relevant evidence the learned judge could not have arrived at any other conclusion except conclude that the prosecution had established a *prima facie* case of trafficking as per the charge. The calling of the defence was correct and we found no reason to disagree with that finding and course of action.

H **[37]** At the defence stage the appellant had chosen not to give evidence on oath but rather preferred to give evidence from the dock. And this course of action was taken even though the amount of drugs seized exceeded 200 grams. Even though the learned judge was quite satisfied by direct evidence that there was
I trafficking, by reason of the transportation or concealment of the drugs, the prosecution still had recourse to s. 37(da) of the Act

to establish trafficking. Under this provision any person who is found in possession of 200 grams or more in weight of cannabis, otherwise than in accordance with the authority of the Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug. Perhaps safe in the thought that it had proved actual possession of the drugs by the appellant, let alone the amount seized from him was huge, the prosecution had requested that the presumption under s. 37(da) of the Act be invoked (*Muhammed Hassan v. PP* [1998] 2 CLJ 170). We see no error in this request on the part of the prosecution.

[38] The appellant's election to give evidence from the dock technically hit both ways. From the prosecution's perspective, it had been deprived of the opportunity to cross-examine the appellant, whilst from the appellant's aspect, with his evidence being untested the probability of him rebutting the presumption of trafficking, let alone the direct evidence of trafficking, had diminished somewhat. Regardless of the appellant's choice it was still incumbent upon the learned judge to consider what was adduced by the appellant, however weak (*Lister v. Quaif* [1983] 1 WLR 48). And this the learned judge did.

[39] The appellant's contention, from the dock, was that a friend called Sam had instructed him to hire a car from a company called Awang Bakar Transport, as he did not possess a driving license. They then went to Rantau Panjang purposefully to look for prostitutes. The appellant related that Sam took the car to meet his wife there but later returned the car to him. The appellant then went back to Johor as the car was only being hired out for four days. On the way to Johor he was stopped by a patrol car for a traffic offence. It was when the boot of the car was opened as directed by SP8 that he saw the slabs of drugs the first time. As regards the spare tyre having been left at his friend's house the appellant alleged that it was because Sam had earlier taken the car away. Pertaining to the cautioned statement he had fabricated it in order to avoid being beaten by the police. He elucidated that Sam was Samsuddin while Maggie was a fabrication.

[40] Pertaining to the aroma of the cannabis the appellant had averred that he could not smell it. What could not be disputed was that it was smelled by SP8 and SP10 and by SP16 who inspected the car four hours later. Therefore the appellant's evidence that he did not smell anything was improbable and against the weight of evidence.

A **[41]** The learned judge at the end of the defence case had opined that the defence was unreasonable, unbelievable and had not rebutted the prosecution's case on a balance of probability. The evidence, be it circumstantial or propped up by the cautioned statement, clearly showed that what happened was planned and
B carried out with full knowledge. Having found the prosecution's case at the end of the defence being successfully proven beyond reasonable doubt, the appellant was accordingly found guilty, convicted and sentenced to death by hanging. Again we could not find any error in this conclusion.

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[42] Based on all the above reasons we had dismissed the appeal.

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